ARAB-MALAYSIAN FINANCE BHD

v.

MOHD ZAKARIA SALIM

COURT OF APPEAL, KUALA LUMPUR
GOPAL SRI RAM JCA
ABDUL KADIR SULAIMAN JCA
ALAUDDIN MOHD SHERIFF JCA
[CIVIL APPEAL NO: J-03-85-1998]
21 FEBRUARY 2002

BANKRUPTCY: *Creditor's petition - Service - Substituted service - Unsealed photostat copy - Whether bankruptcy proceedings vitiated - Whether judgment debtor suffered prejudice - Bankruptcy Rules 1969, r. 110*

The judgment creditor ('appellant'), having taken out a creditors' petition to declare the judgment debtor ('respondent') a bankrupt, served an unsealed photostat copy of the creditors' petition on the respondent by substituted service. The respondent applied to set aside the creditors' petition on the ground that the service of the petition was contrary to r. 110 of the Bankruptcy Rules 1969 ('the Rules'). The High Court allowed the respondent's application; hence, this appeal.

Held:
Per Gopal Sri Ram JCA

[1] For the bankruptcy proceedings to be vitiated *in toto*, the respondent had to show in a clear and convincing manner that he had suffered some serious prejudice or that a miscarriage of justice was occasioned to him by reason of the appellant's failure to comply with r. 110 of the Rules. As there was no material placed before the High Court in any manner to discharge this burden, the respondent's application should not have been granted. (p 533 d-e)

[Appeal allowed.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Pemiutang penghakiman ('perayu'), setelah mengeluarkan petisyen pemiutang-pemiutang untuk mengisytiharkan penghutang penghakiman ('responden') bankrap, telah menyampaikan salinan fotostat petisyen pemiutang-pemiutang yang tidak bermeterai ke atas responden melalui penyampaian ganti. Responden memohon untuk mengenepikan petisyen pemiutang-pemiutang atas alasan bahawa penyampaian petisyen tersebut adalah bertentangan dengan k. 110

Kaedah-kaedah Kebankrapan 1969 ('Kaedah-kaedah tersebut'). Mahkamah Tinggi telah membenarkan permohonan responden; oleh itu, telah menyebabkan rayuan ini.

Diputuskan:
Gopal Sri Ram HMR

[1] Untuk melemahkan prosiding kebankrapan tersebut *in toto*, responden haruslah menunjukkan dengan cara yang jelas dan menyakinkan bahawa beliau telah mengalami kemudaratan yang serius atau bahawa suatu salah laksanakan keadilan telah dilakukan terhadap beliau kerana kegagalan perayu untuk mematuhi k. 110 Kaedah-kaedah tersebut. Oleh kerana tidak terdapat sebarang bahan yang diletakkan di hadapan Mahkamah Tinggi dalam apa cara pun untuk melepaskan bebanan ini, permohonan responden sepatutnya tidak diberikan.

[Rayuan dibenarkan.]

Case(s) referred to:
Au Yong v. Dicum & Anor [1963] MLJ 349 ***(refd)***
Lai Yoke Ngan & Anor v. Chin Teck Kwee & Anor [1997] 3 CLJ 305 ***(foll)***
Maril-Rionebel (M) Sdn Bhd v. Perdana Merchant Bankers Bhd [2001] 3 CLJ 248 ***(foll)***
Muthiah Chettiar ex p Ramanathan Chettiar [1938] MLJ 233 ***(refd)***
Nicholls v. Nicholls [1997] 147 NLJ 61 ***(foll)***
Re V David ex p United Asia Bank Bhd [1991] 2 MLJ 127 ***(refd)***

Legislation referred to:
Bankruptcy Act 1967, s. 131
Bankruptcy Rules 1969, r. 110

For the appellant - C Sukumaran (Ana Shahrana Annuar); C Sukumaran & Co
For the respondent - Mohd Ashri Rais; M/s Ashri Rais & Co

[Appeal from High Court, Muar; Bankruptcy No: 29-719-1996]

Reported by Suresh Nathan

JUDGMENT
(oral)

Gopal Sri Ram JCA (delivering the judgment of the court):
This appeal raises a short point of procedure in bankruptcy. The appellant before us was the judgment creditor in the court below. It took out a creditors' petition to declare the respondent a bankrupt essentially for non-satisfaction of a debt due under a judgment dated 5 December 1995.

The appellant served a copy of the creditors' petition on the respondent by substituted service but it was not a sealed copy of the petition that was posted on the respondent's premises. It was a mere photostat copy.

The respondent took out an application to set aside the creditors' petition on the ground that the service of the petition was contrary to r. 110 of the Bankruptcy Rules 1969. That rule reads as follows:

> Rule 110
>
> (1) If the Court is satisfied by affidavit or other evidence on oath that prompt personal service cannot be effected because the debtor is keeping out of the way to avoid service of the petition or any other legal process or any other cause it may order substituted service to be effected in such manner as it thinks fit.
>
> (2) Where any such order has been carried out the petition shall be deemed to have been duly served on the debtor.

There is no doubt that the rule was breached. But the question is: what is the consequence of the breach?

The appellant argues that the breach only amounts to a mere irregularity under s. 131 of the Bankruptcy Act 1967 which reads as follows:

> 131. No proceeding in bankruptcy shall be invalidated by any formal or by any irregularity, unless the court before which an objection is made to the proceeding is of opinion that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by any order of that court.

In *Au Yong v. Dicum & Anor* [1963] MLJ 349, the Malayan Court of Appeal held that a failure to deliver a sealed copy of the creditors' petition was a mere irregularity and curable under the equipollent precursor of s. 131 of the Bankruptcy Act 1967. The court there distinguished and refused to apply an earlier decision of Sir Percy McElwaine CJ in *Muthiah Chettiar ex parte Ramanathan Chettiar* [1938] MLJ 233.

The respondent however argues that the departure in the present instance is not a mere irregularity but a nullity and counsel for the respondent cited *Re v. David ex p United Asia Bank Bhd* [1991] 2 MLJ 127, a decision of Zakaria Yatim J, (as he then was).

It is our judgment, the time has long passed when courts are troubled by the question as to whether in the initiation or prosecution or conduct of proceedings, the breach of a rule of court amounts to a mere irregularity or a nullity. The modern approach is exemplified by the judgment of Lord Woolf

MR in *Nicholls v. Nicholls* [1997] 147 NLJ 61. That was a case of contempt of court where the breach of an order made in matrimonial proceedings was the subject matter of the complaint. It was held, after a discussion of the earlier authorities on the subject, that a breach of a rule of the court, even in such a serious matter as contempt of court, would be overlooked unless such breach produced a miscarriage of justice or serious prejudice to the alleged contemnor. *Nicholls v. Nicholls* was applied by our Federal Court in the judgment of Mohammed Azmi FCJ in a case concerning the non-observance of the requirements of the Rules of the High Court 1980. See, *Lai Yoke Ngan & Anor v. Chin Teck Kwee & Anor* [1997] 3 CLJ 305.

Further, very recently this court in *Maril-Rionebel (M) Sdn Bhd v. Perdana Merchant Bankers Berhad* [2001] 3 CLJ 248 took the same approach to a breach of the Companies Winding-up Rules which are not dissimilar in context and consequence to adjectival bankruptcy legislation.

Having regard to the authorities referred to a moment ago, we are satisfied that the decision of the learned senior assistant registrar and the learned judge in granting the respondent the order he sought was an error. We are unable to agree with the conclusion of the High Court that the service of a photostat copy of a creditors' petition vitiates bankruptcy proceedings *in toto*. It is our view that it was for the respondent to show in a clear and convincing manner that he has suffered some serious prejudice or that a miscarriage of justice was occasioned to him by reason of the appellant's failure to comply with r. 110 of the Bankruptcy Rules 1969. It is conceded by Encik Mohd Ashri Rais, counsel for the respondent that no material was placed before the High Court in any manner to discharge this burden.

The upshot is that the appeal is accordingly allowed and the usual orders are made in consequence of a successful appeal. The order of the learned senior assistant registrar dated 5 May 1998 and that of the learned judge dated 27 August 1998 are set aside. The creditors' petition is to be fixed for mention on 22 February 2002 at 9am in the Muar High Court to enable that court to fix a date for hearing of the petition. The costs here and in the court below are awarded to the appellant and the deposit is also to be refunded to it.